(2)

Supreme Court, U.S.
FILED
JUN 8 1995
OFFICE OF THE CLERK

No. 94-1872

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

DAVID H. DEIBLER and CARRIE J. DEIBLER,
Petitioners,

V.

ATLANTIC PROPERTIES GROUP, INC. and THE OLD DINNER BELL INN, INC.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Delaware

BRIEF IN OPPOSITION

John S. Grady
Counsel of Record
GRADY & HAMPTON, P.A.
6 N. Bradford Street
Dover, DE 19904
(302) 678-1265

George F. Gardner, III
PARKOWSKI, NOBLE & GUERKE, P.A.
116 W. Water Street
Dover, DE 19904
(302) 678-3262

Counsel for Respondents

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

BEST AVAILABLE COPY

25pp

QUESTION PRESENTED

Whether the scope of notice of the pending sale made through the customary statutory advertising requirements and the contents of the sale bills utilized by the Sheriff of Sussex County afforded Petitioners due process of law under the Fourteenth Amendment of the United States Constitution with regard to the protection of their property interest in their attached corporate stock being sold at execution sale.

PARTIES

Petitioners, David H. Deibler and Carrie J. Deibler are individuals.

Respondents, Atlantic Properties Group, Inc., and The Old Dinner Bell Inn, Inc. (the actual corporate name as reflected in the Delaware Supreme Court's decision is The Old Dinner Bell Inn, Inc. and not "The Dinner Bell Inn, Inc." as named in the filing by Petitioners), a corporation of the State of Delaware.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	9
REASONS FOR DENYING THE WRIT	11
I. THE SCOPE OF NOTICE OF THE SALE AND CONTENTS OF THE SALE BILL AS REQUIRED BY 8 Del.C. §324 AND 10 Del.C. §4972 AFFORDED DUE PROCESS OF LAW TO PETITIONERS	11
II. PETITIONERS DID NOT RAISE ANY ISSUE WITH THE TRIAL COURT CONCERNING THE CONTENTS OF THE SALE BILL OR THE SCOPE OF NOTICE DESPITE A SPECIAL HEARING TO DO SO AND ARE THUS PRECLUDED FROM SUCCESSFULLY CONTENDING THEY HAVE BEEN	

Table of Contents (continued)

Page

DEPRIVED OF DUE PROCESS OF LAW BY VIRTUE OF SUCH WAIVER 15

III. PETITIONERS ARE PRECLUDED FROM SUCCESSFULLY CONTENDING THAT THE SCOPE OF NOTICE OF THE SALE AND CONTENTS OF THE SALE BILL RESULTED IN A DENIAL OF DUE PROCESS OF LAW SINCE THEY ENGAGED IN ACTIVITY DESIGNED TO SUBVERT THE JUDICIAL SALE . 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases — Page(s)

Burge v. Fidelity Bond and Mortg. Co.
648 A.2d 414 (Del.Supr. 1994) 13

Colton v. Wade
80 A.2d 923 (Del.Chan. 1951) 18

Deibler v. Atlantic Properties, Inc.
652 A.2d 553 (Del.Supr. 1995) . . . 3,18

Holmes v. Conway
241 U.S. 624 (1916) 14

Snyder v. Massachusetts
291 U.S. 97 (1934) 14

United States Constitution

Article XIV, Section 1 3

Statutes

8 Del.C. §324 3,13,15

10 Del.C. §4972 3,13,15

No. 94-1872

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1994

DAVID H. DEIBLER and CARRIE J. DEIBLER,

Petitioners,

v.

ATLANTIC PROPERTIES GROUP, INC. and
THE OLD DINNER BELL INN, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Atlantic Properties Group, Inc., a Delaware corporation, and The Old Dinner Bell Inn, Inc., a Delaware corporation, respectfully request that

this Court deny the Petition for Writ of Certiorari submitted by the Petitioners, David H. Deibler and Carrie J. Deibler.

OPINIONS BELOW

This case was originally brought in the Superior Court of the State of Delaware in and for Sussex County and was known as C.A. No. 93M-11-001. After trial on December 30, 1993 and January 4, 1994, Judge T. Henley Graves issued an oral decision on January 5, 1994 and a written decision on January 6, 1994 confirming a sheriff's sale of stock held on July 30, 1993 of ten shares of a corporation known as Coastal Resort Properties, Inc. and 500 shares of a corporation known as The Old Dinner Bell Inn, Inc. to Respondent Atlantic Properties Group, Inc.

The Delaware Supreme Court unanimously affirmed the judgment by

written opinion dated January 11, 1995 which opinion is reported as Deibler v. Atlantic Properties, Inc., 652 A.2d 553 (Del.Supr. 1995). Petitioners' application for a rehearing was denied on February 10, 1995.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the United States Constitution, Amendment XIV, Section 1.

STATUTES INVOLVED

The statutes in issue are 8 Del.C. §324 and 10 Del.C. §4972.

STATEMENT OF THE CASE

On November 25, 1992, a judgment creditor of Petitioners, Prickett, Jones, Elliott, Kristol & Schnee ("PJEK&S") entered judgment against Petitioners in the sum of $121,250.08. Following

discovery PJEK&S attached 500 shares of corporate stock of The Old Dinner Bell Inn, Inc., 100 shares of stock of Distant Horizon Dream, Inc. and 10 shares of Coastal Resort Properties, Inc. A sheriff's sale of these closely held corporate stock was scheduled for July 30, 1993 to be conducted by the Sussex County Sheriff's Office.

On July 2, 1993, the Sussex County Superior Court, after a full hearing at which Petitioners and their counsel were afforded the opportunity to participate in fashioning both the contents of the proposed sale bill and the scope of notice of the sale, entered an order for the sale. Petitioners were also advised by the Court that they were free independently to supplement the normal scope of notice and contents of the sale bill and declined to do so.

Prior to the sale and despite the fact that their stock in these three corporations had been attached by the Sheriff of Sussex County and was held in Custodia Legis, Petitioners sought to avoid or disrupt the sale by filing certificates of dissolution with the Delaware Secretary of State for all three corporations and to record deeds from The Old Dinner Bell Inn, Inc. and Coastal Resort Properties, Inc. conveying certain real estate assets of these corporations to themselves.

Respondent Atlantic Properties Group, Inc. ("Atlantic") was the successful bidder for the Dinner Bell and Coastal stock and after Petitioners refused to give Atlantic possession of the Dinner Bell Restaurant and Motel, Atlantic commenced this action for a writ of possession.

Petitioners, in addition to resisting the writ of possession, challenged the confirmation of the sheriff's sale both on the basis that the contents of the sale bill and the scope of advertising for the sale of stock failed to meet the minimum standards of due process required to protect their property interests and on the basis that the sale price paid for the stock was grossly inadequate. Petitioners have continued to contend that the sale should not have been confirmed.

Following a trial of all issues on December 30, 1993 and January 4, 1994, the Sussex County Superior Court issued an order granting a writ of possession for the Dinner Bell property and confirming the sheriff's sale.

Petitioners took an appeal to the Delaware Supreme Court and by opinion dated January 11, 1995, rehearing denied

February 10, 1995, the Delaware Supreme Court affirmed the lower Court's confirmation of the sheriff's sale of the stock and holding that the Petitioners were not deprived of their due process of law. The Delaware Supreme Court made special note of the fact that Petitioners own conduct in engaging in activity designed to subvert the judicial sale process was a contributing factor to this result.

In this petition, Petitioners, appearing pro se, largely seek to reargue the factual findings reached by prior courts and essentially by their petition seek a rehearing as to the resolution of issues of fact decided in the Court Below against them.

To the extent that Petitioners' contentions reach the level of a legal contention it is that the scope of notice

for the sale and the contents of the sale bill, which they admitted at trial conformed to extant Delaware statutes, have deprived them of their protected property interest in their stock by limiting advertising for bidders and by limiting available information which if known would have resulted in a higher bid price for the stock and that such limitations have deprived them of due process of law. Petitioners make this argument despite the fact that at a judicially supervised hearing they and their counsel were afforded the opportunity for input into the scope of notice and the contents of the sale bill and were permitted to supplement the same although they declined to further participate.

The Delaware Supreme Court on undisputed facts found that Petitioners

themselves engaged in activity which subverted the judicial sale and thus adversely impacted their own rights prior to the day of sale. A review of the facts of this case and relevant authorities reveals that the Trial Court and the Delaware Supreme Court both properly applied the facts to the law and determined that Petitioners' property rights were adequately protected and thus, in the instant case, certiorari should be denied.

SUMMARY OF THE ARGUMENT

I. This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. The property rights of Petitioners were at all times carefully supervised and protected by the Trial Court and the scope of notice and contents of the sale bill to which

Petitioners now object are conceded to have conformed to Delaware law and were found by the Trial Court and the Delaware Supreme Court to afford due process of law to Petitioners. On the due process issue, Petitioners were afforded the opportunity both as to the scope of notice and as to the contents of the sale bill to go beyond the minimum requirements of the Delaware statute and at a presale hearing declined to do so.

II. What Petitioners really seek to have this Court do is to retry the operative facts relating to value that were necessarily found against Petitioners as a part of the sale confirmation process and such retrying of factual issues does not present an appropriate reason for this Court to grant certiorari.

III. Even if Petitioners had a legitimate constitutional issue relating

to violation of their property rights and a failure to receive due process of law, Petitioners would be precluded in this case from successfully making such a contention since Petitioners engaged in activity immediately prior to the sale specifically designed to subvert the judicial sale and to frustrate the judgment creditor bringing the sale and bidders such as Respondent Atlantic from receiving the benefits of their successful competitive bid at the sale.

REASONS FOR DENYING THE WRIT

I.
THE SCOPE OF NOTICE OF THE SALE AND CONTENTS OF THE SALE BILL AS REQUIRED BY 8 Del.C. §324 AND 10 Del.C. §4972 AFFORDED DUE PROCESS OF LAW TO PETITIONERS.

Petitioners have failed to satisfy criteria traditionally applied by this Court in determining whether to grant a

writ of certiorari. In an effort to obtain review here, Petitioners have filed a petition characterized by their opinions and their arguments cast in a manner that, reduced to its essence, is more suitable for a rehearing to resolve issues of fact and, in particular, the testimony of appraisers as to property value. In their characterization of the question presented for review, Petitioners contend that they were deprived of due process of law by exposure of their attached and seized stock under circumstances where the scope of notice and the contents of the sale bill were so lacking in detail so as to deprive Petitioners of due process of law and consequent loss of property.

The Delaware Supreme Court applied and confirmed long standing Delaware case law in determining that the price bid for the stock was adequate and that there were

no defects or irregularities in the process of conducting the sale or any other sufficient matter whereby the rights of parties to or interested in the sale could have been prejudiced. Burge v. Fidelity Bond and Mortg. Co., 648 A.2d 414 (Del.Supr. 1994).

With regard to Petitioners' contention that they had been deprived of their protected property interests and of fundamental fairness and due process of law, the Delaware Supreme Court held that the advertising process followed by the Superior Court (the Trial Court) and the Sheriff of Sussex County were in compliance with the long established statutory procedures for the sale of attached stock enunciated in 8 Del.C. §324 and 10 Del.C. §4972. Clearly, these statutes comport with the minimum standards of procedural and substantive

due process and furnish no basis for this Court to exercise its discretionary review powers.

The due process clause of the Fourteenth Amendment is not intended to control procedure in state courts or to regulate practices. Holmes v. Conway, 241 U.S. 624 (1916). A state such as Delaware is free to regulate the procedures relating to its execution process which are a function of its courts based on its own conception of policy and fairness unless by doing so it offends some principle of justice. Snyder v. Massachusetts, 291 U.S. 97 (1934). No principles of justice are offended by the state procedures utilized in this case.

Succinctly stated, the rights of Petitioners were carefully supervised by the Trial Court and carefully reviewed by the Delaware Supreme Court and a review of

the facts and the applicable statutes clearly establishes, both as to the scope of notice and to the contents of the sale bill, that the requirements of Delaware law were met.

II.
PETITIONERS DID NOT RAISE ANY ISSUE WITH THE TRIAL COURT CONCERNING THE CONTENTS OF THE SALE BILL OR THE SCOPE OF NOTICE DESPITE A SPECIAL HEARING TO DO SO AND ARE THUS PRECLUDED FROM SUCCESSFULLY CONTENDING THEY HAVE BEEN DEPRIVED OF DUE PROCESS OF LAW BY VIRTUE OF SUCH WAIVER.

The Trial Court and the Delaware Supreme Court both found that while the Trial Court was willing to exercise its broad supervisory discretion to permit the supplementation of notice required by 8 Del.C. §324 (which references 10 Del.C. §4972), Petitioners did not pursue that opportunity with the Court at or

immediately after the time of the hearing where they could have done so and have thus waived such rights. What the Delaware Supreme Court was asked to do in the Court Below and what this Court is being asked to do is to simply set aside findings of fact and in essence determine whether the Court Below breached its sound discretion in failing to set aside the sheriff's sale of stock. It is respectfully submitted that it is not the purpose of review on certiorari by this Court in a non-constitutional setting to simply substitute its judgment for that of the Court Below. Such judicial discretion by the Delaware Supreme Court involved the application of Delaware state statutes and Delaware case law. No constitutional rights of either these Petitioners or of persons similarly situated in the future are at issue. This Court should decline

to exercise its jurisdiction to hear this matter.

III.
PETITIONERS ARE PRECLUDED FROM SUCCESSFULLY CONTENDING THAT THE SCOPE OF NOTICE OF THE SALE AND CONTENTS OF THE SALE BILL RESULTED IN A DENIAL OF DUE PROCESS OF LAW SINCE THEY ENGAGED IN ACTIVITY DESIGNED TO SUBVERT THE JUDICIAL SALE.

Even assuming that Petitioners could convince this Court that the Delaware statutes relating to scope of notice and contents of sale bills do not meet the minimum standards of due process and that Petitioners either did not waive or were wrongfully affirmatively denied at the hearing in which they participated the right to expand on the minimum statutory requirements, Petitioners are precluded from having the sheriff's sale set aside in the instant case because they

personally engaged in activity designed to subvert the judicial sale. The Court Below reached such a conclusion. Deibler v. Atlantic Properties, Inc., 652 A.2d 553 (Del.Supr. 1995 at p. 558). That determination is a matter of state law and procedure and is not a constitutional issue. The principle of not profiting by one's own wrong doing is deeply embedded in Delaware law. Colton v. Wade, 80 A.2d 923 (Del.Chan. 1951). Petitioners ask this Court to overlook their own conduct. This Court should not permit Petitioners to profit by their own wrongdoing.

The Delaware Supreme Court carefully followed the standards and guidelines of Delaware statutory law, its own standards established in the Delaware cases and correctly held that Petitioners, even ignoring their own activity designed to subvert the judicial sale process, were

not deprived of due process by having their stock sold at a sheriff's sale where the scope of notice and the contents of the sale bill both met minimum due process standards and could have been expanded on by Petitioners with Court approval.

CONCLUSION

Accordingly, for all of the foregoing reasons, Petitioners' request for a writ of certiorari should be denied.

Respectfully submitted,

JOHN S. GRADY
Counsel of Record
Grady & Hampton, P.A.
6 N. Bradford Street
Dover, De 19904
(302) 678-1265

GEORGE F. GARDNER, III
Parkowski, Noble & Guerke, P.A.
116 W. Water Street
Dover, DE 19904
(302) 678-3262

Counsel for Respondents